

## **MEETING NOTICE AND AGENDA**

Name of Organization: Legislative Commission's Subcommittee to Study Employee Misclassification (Senate Concurrent Resolution No. 26, File No. 100, *Statutes of Nevada 2009*)

Date and Time of Meeting: Thursday, June 10, 2010  
9 a.m.

Place of Meeting: Grant Sawyer State Office Building  
Room 4401  
555 East Washington Avenue  
Las Vegas, Nevada

Note: Some members of the Subcommittee may be attending the meeting and other persons may observe the meeting and provide testimony, through a simultaneous videoconference conducted at the following location: Legislative Building, Room 2135, 401 South Carson Street, Carson City, Nevada.

*If you cannot attend the meeting, you can listen or view it live over the Internet. The address for the Nevada Legislature website is <http://www.leg.state.nv.us>. Click on the link "Live Meetings – Listen or View."*

<p>Note: Minutes of this meeting will be produced in summary format. Please provide the secretary with electronic or written copies of testimony and visual presentations if you wish to have complete versions included as exhibits with the minutes.</p>
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## **A G E N D A**

**Note: Items on this agenda may be taken in a different order than listed.**

\*Denotes items on which the Subcommittee may take action.

I. Opening Remarks

Senator Shirley A. Breeden, Chair

\*II. Approval of Minutes of the Meeting Held on April 5, 2010, in Las Vegas, Nevada

III. Public Comment

**(Because of time considerations, the period for public comment by each speaker may be limited, and speakers are urged to avoid repetition of comments made by previous speakers.)**

\*IV. Work Session – Discussion and Possible Action on Recommendations to:

- A. Define “employee” and “independent contractor” in *Nevada Revised Statutes* (NRS) and include those definitions in State labor law posters;
- B. Implement fines and penalties on employers who misclassify employees as independent contractors;
- C. Provide for a process and associated funding mechanism by which claims of misclassification may be reported and investigated, which may include creation of a task force and/or statewide study of the problem in Nevada;
- D. Standardize the statutory test to determine whether an individual is an employee or independent contractor;
- E. Require annual reports, retention of employment records, and random audits of employers that use independent contractors;
- F. Prohibit agreements between employers and workers that result in the misclassification of that worker as an independent contractor;
- G. Require a provision of health insurance by employers who use large numbers of independent contractors in their workforce;
- H. Adopt model legislation from the National Conference of Insurance Legislators known as the Construction Industry Workers’ Compensation Coverage Act;
- I. Implement penalties against anyone who, in a professional capacity, advises a client to misclassify employees as independent contractors for the purposes of avoiding taxes and benefits;
- J. Allow for legal action in cases of misclassification and recovery of legal expenses; and
- K. Authorize the State Public Works Board to oversee issues concerning employee misclassification on public works projects.

The “Work Session Document” is attached below and contains recommendations proposed at this and other meetings of the Legislative Commission’s Subcommittee to Study Employee Misclassification during the 2009-2010 Legislative Interim. The document is also available on the Subcommittee’s webpage [Legislative Commission's Subcommittee to Study Employee Misclassification \(S.C.R. 26\)](#), or a written copy may be obtained by contacting Linda J. Eissmann, Principal Research Analyst, Research Division, Legislative Counsel Bureau, at (775) 684-6825.

## V. Adjournment

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Note: We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify the Research Division of the Legislative Counsel Bureau, in writing, at the Legislative Building, 401 South Carson Street, Carson City, Nevada 89701-4747, or call Tracey Wineglass at (775) 684-6825 as soon as possible.

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Notice of this meeting was posted in the following Carson City, Nevada, locations: Blasdel Building, 209 East Musser Street; Capitol Press Corps, Basement, Capitol Building; City Hall, 201 North Carson Street; Legislative Building, 401 South Carson Street; and Nevada State Library, 100 Stewart Street. Notice of this meeting was faxed and e-mailed for posting to the following Las Vegas, Nevada, locations: Clark County Government Center, 500 South Grand Central Parkway; and Capitol Police, Grant Sawyer State Office Building, 555 East Washington Avenue. Notice of this meeting was posted on the Internet through the Nevada Legislature’s website at [www.leg.state.nv.us](http://www.leg.state.nv.us).



## **WORK SESSION DOCUMENT**

### **LEGISLATIVE COMMISSION'S SUBCOMMITTEE TO STUDY EMPLOYEE MISCLASSIFICATION**

(Senate Concurrent Resolution No. 26, File No. 100, *Statutes of Nevada 2009*)

June 10, 2010

The following "Work Session Document" was prepared by the staff of the Legislative Commission's Subcommittee to Study Employee Misclassification. It is designed as an outline to assist the Subcommittee members in making decisions concerning recommendations to be forwarded to the Legislative Commission and ultimately to the 2011 Session of the Nevada Legislature. The recommendations contained herein were either submitted in writing to the Subcommittee, discussed during one of the Subcommittee's meetings, or suggested by a member of the Subcommittee for consideration at the final meeting.

The possible actions identified in this document are in no particular order and should not be construed as having the support of the Subcommittee or its individual members. Rather, they are compiled so the members may review and discuss them during the work session to decide if they should be adopted, changed, rejected, or further considered. The recommendations are numbered for ease of reference during discussion at the final meeting.

To be adopted, recommendations must be approved by a majority of the Subcommittee members present.

In accordance with *Nevada Revised Statutes* (NRS) 218D.160, the Subcommittee may recommend no more than five bill draft requests that relate to matters within the scope of the study. The requests must be submitted no later than July 1, 2010 (NRS 218E.205). Other items not requiring legislation, such as requests for letters, may be sent by the Chair of the Subcommittee.

## RECOMMENDATIONS

### Clarifying “Employee” and “Independent Contractor” in NRS

1. **Enact legislation providing clear definitions in NRS for “employee” and “independent contractor.”** *(Note: No specific definitions were suggested by the sponsor.)*

*Suggested by Andrew J. Kahn, Attorney, McCracken, Stemerman and Holsberry, in a letter submitted to the record, January 22, 2010*

Background: In order to draft this recommendation, specific definitions must be determined.

For the purposes of unemployment compensation, these terms are not specifically defined in statute. However, an individual is considered an independent contractor if three specific conditions are met in NRS 612.085. This is commonly referred to as the ABC test. If the three conditions are *not* met, the individual is presumed to be an employee for the purposes of unemployment insurance as well as application of the Modified Business Tax (MBT).

For the purposes of workers’ compensation coverage, NRS defines an independent contractor as a person who renders service for a specified recompense for a specified result, under the control of the person’s principal as to the result of a person’s work only and not as to the means by which such result is accomplished (NRS 616A.255). Statute further defines an “independent enterprise” for purposes of worker’s compensation coverage as someone who holds a business or occupational license in his or her own name, or owns, rents, or leases property used in furtherance of the business (NRS 616B.603).

### Comprehensive Legislation

2. **Enact comprehensive legislation to:**
  - a. **Clearly define “employee” and “independent contractor.”** An employee would be any individual who performs work under direct control of an employer (using the ABC test as a guide). The definition of independent contractor would generally be an individual who must be properly licensed, bonded, and insured to do the work for which they are contracted (similar to subcontractors or consultants);
  - b. **Require annual employment reports to the State by companies who use independent contractors.** These reports would be consistent with those currently required for unemployment insurance by Nevada’s Department of Employment, Training and Rehabilitation, and would require disclosure of all individuals paid with an Internal Revenue Service Form-1099 (used for payment to independent contractors) and all contracts signed with independent contractors;

- c. **Require retention of employment and independent contractor records for at least three years;**
- d. **Require that the information on State labor law posters include definitions of employees and independent contractors, and that the posters be placed in the area where work is performed or employees congregate, depending on the job site;**
- e. **Allow for third-party reporting of violations and mandate investigation by the appropriate State agency (for unemployment insurance, workers' compensation coverage, labor violations, or tax evasion) when a misclassification claim is filed;**
- f. **Create a formula to randomly audit all employers to ensure compliance with the laws concerning employee misclassification as independent contractors** *(Note: Details concerning a funding mechanism to support the audits and the entity tasked with conducting the audits would need to be determined); and*
- g. **Implement a fine of \$5,000 per employee on each employer found to be misclassifying employees for the first offense, with subsequent offenses subject to increasing fines up to \$50,000, loss of ability to do business for a prescribed period of time, and possible criminal penalties up to and including jail time.** *(Note: Details would need to be provided.)*

*Suggested by Jack Mallory, Director of Government Affairs, International Union of Painters and Allied Trades, District Council 15, April 5, 2010, meeting and correspondence*

Background: To approve this recommendation, the Subcommittee must agree on details concerning the audit suggestion and provide guidance on the implementation of the increasing fine from \$5,000 to \$50,000 and other penalties.

Mr. Mallory testified on the extent and impact of worker misclassification at both meetings of the Subcommittee and believes comprehensive legislation would help to address the problem.

### **3. Enact comprehensive legislation to:**

- a. **Ensure the ABC test is applied in all tests for unemployment insurance (and by extension the MBT) and workers' compensation coverage to determine whether an employee is a legitimate independent contractor;**
- b. **Assign stricter penalties on employers who knowingly misclassify workers as independent contractors including a fine of \$15,000, debarment for 3 years on public contracts, and 3.5 years in jail for the first offense, with a graduated penalty for each subsequent offense. For those who unknowingly misclassify employees as independent contractors, the fine should be \$2,500 per employee;**

*(Note: Details for subsequent offenses were not provided. As an alternative, a first offense could be a misdemeanor, a second offense could be a gross misdemeanor, and subsequent offenses could become felony violations.)*

- c. Provide for a private right of action by an individual, group, or third party organization (including labor organization) to pursue civil penalties against employers who misclassify their employees as independent contractors. This should include allowing misclassified employees to seek unpaid back wages as well as legal fees;**
- d. Prohibit agreements between employers and workers that result in the misclassification of that worker;**
- e. Establish a coordinated process or system among appropriate State agencies to ensure the State is adequately prepared to review instances of misclassification, including information sharing, resource sharing, and joint investigations; and**
- f. Implement a funding mechanism (either through a line-item budget or a small fee on registered independent contractors) to ensure necessary resources for investigations and litigation against employers who misclassify workers.**  
*(Note: Independent contractors are not currently required to register; a registration procedure would be required to implement this suggestion.)*

*Suggested by Fran Almaraz, Subcommittee member, correspondence to staff, May 12, 2010, and by Dan Reilly, State Legislative and Political Director, International Brotherhood of Teamsters, April 5, 2010, meeting and correspondence*

Background: The ABC test is found in NRS 612.085, as mentioned under Recommendation No. 1, and currently applies only to unemployment compensation in Nevada (and by extension, for application of the MBT).

#### **Misclassification Complaints, Studies, and Coordinated Agency Efforts**

- 4. Enact legislation similar to Colorado's HB 09-1310, approved in 2009, which contains two primary provisions: (a) a means to investigate complaints of employee misclassification with associated penalties; and (b) a statewide study of the extent of the problem.**

*Discussed by the Subcommittee, April 5, 2010*

Background: Colorado's law provides that the Division of Employment and Training in the Department of Labor and Employment (the state's Unemployment Insurance Program) is responsible for accepting and investigating complaints regarding employee misclassification and for enforcing the requirements of the law. The measure further allows any person to

file a written complaint alleging misclassification and sets forth a process and timeline for investigating and rendering a determination regarding each complaint.

If an employer is found to have willfully disregarded the law, the law allows for a fine of up to \$5,000 per misclassified employee for the first offense. For second and subsequent offenses, the fine is increased to \$25,000 per misclassified employee and issuance of an order prohibiting the employer from contracting with the State of Colorado for a period up to two years. An appeals process is provided.

A report must be submitted to the Legislature with information concerning the complaints received and the outcome of the investigations.

Further, the law provides for a statewide study of the issue of employee misclassification, including estimates on the amount of revenue lost to the state and an analysis of the extent of the problem.

- 5. Enact legislation creating a streamlined means in NRS by which complaints of worker misclassification can be submitted (via e-mail, online, or regular mail) and forwarded to the appropriate entity for investigation. This could also include formally creating a task force of agencies involved in aspects of misclassification, which would not only share information but also meet in an advisory capacity to make reports and recommendations to the Legislature.**

*Concept discussed by the Subcommittee, April 5, 2010*

Background: Streamlined notification could mirror legislation in Indiana (*Indiana Code 22-1-1-22*). Although the law is specific to construction contractors, the complaint reporting process is apparently working very effectively. The law requires the Department of Labor to cooperate with the Department of Workforce Development, Department of State Revenue, and Worker's Compensation Board by sharing information concerning any suspected improper classification by a contractor of an individual as an independent contractor. The law further provides that all information shared is confidential and may not be published or open to public inspection. Any officer or employee who knowingly or intentionally discloses this confidential information is guilty of a misdemeanor.

Although many states have a created task force through executive order, New Hampshire is an example of one created through legislation (Senate Bill 500, Sections 378-7 through 378-11). It is also an advisory, not enforcement, task force.

The New Hampshire Task Force on Employee Misclassification was created in 2008 and focuses on the extent of misclassification; relative levels of misclassification on different industries and regions of the state; and the impact of misclassification on worker protections, revenue, and funding. Further, the Task Force is required to report its findings and, if necessary, develop a statewide strategy to begin to address the issues identified, including recommendations for legislation.

Membership consists of 16 members including appropriate agencies, 2 legislators, and private sector representatives appointed by the Governor.

### **Model Legislation**

#### **6. Enact legislation adopting the National Conference of Insurance Legislators' (NCOIL) Construction Industry Workers' Compensation Coverage Act model legislation.**

*Mentioned in general discussion, April 5, 2010*

Background: Stemming from 2009 Tennessee and West Virginia laws, the model mandates workers' compensation in the construction industry with the exception of sole proprietors on residential projects and homeowners, and holds primary contractors liable for the uninsured employees of any subcontractor hired. The legislation establishes auditing procedures, provides penalties for insurance fraud, and enhances state enforcement authority, based on provisions of Florida workers' compensation statutes.

Originally proposed as a broad-based workers' compensation bill dealing with all employments, the model was narrowed to hone in on construction—an area of widespread abuse. An NCOIL Subcommittee held seven conference calls between the NCOIL Summer and Annual Meetings to develop the model. On the conference calls, legislators rejected a nine-point test for independent contractor status and synchronized model definitions with already established language in state workers' compensation, disability, and unemployment statutes. *(Note: NCOIL is an organization of state legislators whose main area of public policy interest is insurance legislation and regulation. Most legislators active in NCOIL either chair or are members of the committees responsible for insurance legislation in their respective state houses across the country.)*

### **Penalties, Fines, and Employer Responsibilities**

#### **7. Enact legislation providing for a civil or criminal penalty against any person (including attorneys, accountants, and human resource specialists) who knowingly advises an employer to misclassify employees as independent contractors.**

*Suggested by Assemblywoman Bonnie Parnell, Vice Chair, April 5, 2010, meeting*

Background: Testimony on January 22 indicated that employers are being advised to cut costs and avoid taxes by classifying their employees as independent contractors. Testimony referenced recent legislation in California (Senate Bill 1583) that would have prohibited a person, for pay, from knowingly advising an employer to misclassify employees as independent contractors. The prohibition did not extend to attorneys or to persons advising their employers. Although the bill was passed in both the House and Senate, it was vetoed by the Governor.



**8. Enact legislation providing for a private right of action for workers or their representatives in cases of employee misclassification.**

*Discussed by the Subcommittee during testimony of Catherine Ruckelshaus, Legal Co-Director, National Employment Law Project, April 5, 2010*

Background: During Ms. Ruckelshaus' testimony on April 5, private right of action was discussed. Ms. Ruckelshaus subsequently sent a letter with information concerning those states with employee misclassification laws that provide a worker or the worker's representative an independent right to go directly to court to enforce the worker's rights under the law. The states with such a right include Delaware, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, and New Hampshire.

Other states allow a worker the right to go directly to court only after he or she has exhausted remedies at the agency level. These states include Colorado, Louisiana, Montana, New Mexico, and Washington.

**9. Enact legislation providing for reimbursement of legal expenses to the claimant by the employer if the employer knowingly misclassified the claimant.**

*Suggested by Andrew J. Kahn, Attorney, McCracken, Stemerman and Holsberry, in a letter submitted January 22, 2010*

Background: Testimony at both meetings has referenced the difficulty of misclassified workers to pay for legal expenses associated with actions against employers.

**10. Enact legislation mandating provision of health insurance by companies regularly using large independent contractor workforces. (Note: Size of workforce not specified.)**

*Suggested by Andrew J. Kahn, Attorney, McCracken, Stemerman and Holsberry, in a letter submitted January 22, 2010*

Background: Testimony at both meetings described the problem of misclassified workers being denied access to employer health plans. Health care costs are among the expenses employers avoid by misclassifying employees.

In order to adopt this recommendation, the specific size of the workforce must be determined.

## **Public Works**

- 11. Add provisions to NRS that would allow oversight by the State Public Works Board concerning worker misclassification as independent contractors on public works projects.**

*Suggested by Assemblywoman Bonnie Parnell, Vice Chair, in response to concerns raised by witnesses regarding public works projects.*

Background: Senate Concurrent Resolution No. 26 tasks the Subcommittee with determining the scope of employee misclassification in Nevada and making recommendations for State processes to identify and address misclassification. Witnesses requested changes to prevailing wage laws on public works projects; however, prevailing wage concerns are not within the scope of the Subcommittee's charge. Therefore, this recommendation has been modified to address the misclassification of employees as it pertains to public works projects.